



# **Moot Court**

## **An Appellate Court Simulation**

*Michigan Citizens for Water Conservation*  
v  
*Nestlé Waters North America, Inc.*

### **Teacher Guide**



#### **Michigan Supreme Court Learning Center**

925 W. Ottawa St.  
P.O. Box 30205  
Lansing, MI 48909  
517-373-7171

web: [courts.mi.gov/education/learning-center/](http://courts.mi.gov/education/learning-center/)

# Contents

Introduction .....	3
Grade Level and Curriculum .....	3
Suggestions for Collaboration.....	4
MCWC v Nestlé: Background .....	5
Sequence of Activities .....	6–9
Tips for Teachers.....	10
Statement of the Case .....	11
Case History .....	12
Questions Involved .....	13
Job Descriptions.....	14–20
Tips for Legal Research .....	21
Guide for Attorneys .....	22–24
Guide for Justices .....	25–26
Order of Business.....	27–28
Glossary.....	29–33
Further Resources .....	34–37

## Introduction

Simulations, such as mock trials and moot court, can be excellent ways to engage students in real-life situations that require higher-order thinking. They allow students to practice skills related to public discourse and decision making, and they bring government procedures to life.

Moot court replicates the conversation between attorneys and judges/justices at the appellate level. This structured discourse requires those involved to understand the case from all angles and to project the impact of decisions on future cases.

*Michigan Citizens for Water Conservation v Nestlé Waters, North America, Inc.* (2007) is based upon a court case of the same name, which proceeded through the state court system and was decided by the Michigan Supreme Court in July 2007. The original case was extremely complicated, involving numerous issues, appeals, cross-appeals, and *amicus curiae* briefs. *To make the case more straightforward, this simulation examines two questions: (1) balancing the rights of landowners using surface water and those using ground water, and (2) a public trust doctrine issue, determining whether the state is responsible for protecting the waterway in question for the interest of the common good. One amicus brief, in support of each side is also included.* In the actual case, the Michigan Supreme Court chose only to examine the issue of standing (the plaintiffs' right to sue).

The materials for this case were originally written for the high school session of the Learning Center's Exploring Careers in the Law, 2007. Participants were 10th–12th grade students interested in pursuing legal careers. For more information about Exploring Careers in the Law, contact Rachael L. Drenovsky, Learning Center Coordinator, at 517-373-5027 or [drenovsky@courts.mi.gov](mailto:drenovsky@courts.mi.gov).

## Grade Level and Curriculum

These materials are intended for use at the high school or undergraduate level. They align with multiple standards and strands of the Michigan Curriculum Framework, including:

### Social Studies

C 1.1.3, C 2.2.1, C 2.2.3, C 2.2.5, C 3.3.4, C 3.3.7, C 3.4.4, C 3.4.5, C 5.3.3, C 6.1.1, C 6.1.2, C 6.1.3, C 6.1.4, C 6.1.5, C 6.2.1, C 6.2.3, C 6.2.5, C 6.2.10, C 6.2.11

### English Language Arts

CE 1.3.1, CE 1.3.2, CE 1.3.5, CE 1.3.6, CE 1.3.7, CE 1.3.8, CE 1.3.9, CE 1.5.1, CE 1.5.2, CE 1.5.3, CE 1.5.5, CE 2.1.1, CE 2.1.3, CE 2.1.4, CE 2.1.7, CE 2.1.10, CE 2.1.11, CE 2.2.2, CE 2.2.3, CE 2.3.1, CE 2.3.3, CE 2.3.4, CE 2.3.5, CE 4.1.1, CE 4.1.2, CE 4.1.3, CE 4.1.4, CE 4.2.1, CE 4.2.2

### Science

E 4.1

## Suggestions for Collaboration

Moot court can provide an excellent opportunity for collaboration across the curriculum and with members of the community. In addition to enlisting those who teach social studies, speech, debate, and science, instructors may also wish to involve experts from the legal field, including lawyers, judges, law professors, and law students. Moot court competitions are a popular extra-curricular activity in law schools, so many members of the legal community have experience in preparing and presenting a moot court.



## MCWC v Nestlé Background

### Real Case

*Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.* is based on a court case of the same name, which proceeded through the state court system and was decided by the Michigan Supreme Court in July 2007. In the actual case, the Michigan Supreme Court chose only to examine the issue of standing (the plaintiffs' right to sue).

### At Issue

The case is important because it deals with water rights, an issue that promises to become increasingly significant as the world's population rises and more people live in arid climates. Unlike in the dry American West, Michigan's water law is still unsettled, which means that precedents are still being set. In addition to the environmental issues involved, the case can be examined as an instance in which grassroots environmentalists and local landowners challenged the actions of an international corporation.

The case, which began in 2001, centers on the following questions:

- How should courts balance the rights of those using surface water with those using ground water?
- Should the public trust doctrine (the state's responsibility to protect navigable waters for the common good) apply in this case?



## Sequence of Activities

### Time Required

The simulation can be completed in 1–2 weeks. (If you wish to use these materials for a mini moot court, see instructions at

[http://www.streetlaw.org/en/landmark/teaching\\_strategies/moot\\_court.](http://www.streetlaw.org/en/landmark/teaching_strategies/moot_court.))

- Steps 1–2      1–2 class periods
- Step 3        1 class period
- Step 4        1–3 class periods
- Step 5–6      1–2 class periods
- Step 7–8      1–2 class periods

1. Discuss the structure of the Michigan court system, explaining the difference between trial courts, which conduct trials, and appellate courts that review those trials to see if they were conducted fairly. The Michigan Supreme Court, which is the highest state court, is the final word on the law in the State of Michigan.

### Resources

- Michigan's One Court of Justice, Michigan Supreme Court Learning Center  
<http://courts.mi.gov/education/learning-center/Pages/Michigan's-Current-Court-System.aspx>
- Self-Help Center: Types of Courts, State Court Administrative Office  
<http://courts.mi.gov/self-help/center/general-information/pages/types-of-courts.aspx>

2. Discuss how a court case proceeds to the Michigan Supreme Court and the role that oral arguments play in the Court's decision-making process. Oral arguments are structured, highly stylized conversations between the attorneys and judges or justices about a case. It is very helpful for students to see and/or hear how they are conducted. Several resources are available.

### Resources

- Oral Arguments in the Michigan Supreme Court, MSC Learning Center  
This video resource and companion classroom discussion guide examine the role of oral arguments in the appellate process of the Michigan Supreme Court. The resource uses the civil case *Wayne County v Hathcock* as a case study. The case decided issues related to eminent domain and property rights.  
Discussion Guide <http://courts.mi.gov/education/learning-center/Curriculum/Oral-Arguments-in-Supreme-Court-Discussion-Guide.pdf>  
VHS/DVD Request Form <http://courts.mi.gov/education/learning-center/Curriculum/Oral-Arguments-in-Supreme-Court-Request-Form.pdf>
- About the Court, Michigan Supreme Court  
<http://courts.mi.gov/courts/michigansupremecourt/about-supreme-court/pages/default.aspx>

- Supreme Court Processing of Cases, Michigan Supreme Court  
<http://courts.mi.gov/courts/michigansupremecourt/clerks/pages/how-a-case-is-decided.aspx>
3. Distribute the Statement of the Case, Case History, and Questions Involved to students. Review the facts of the case and debate the merits of each side.
    - What happened in the case? (See Statement of the Case and Case History)
    - Who are the appellants and appellees?
    - Where did the original controversy occur?
    - What are the issues involved? (See Questions Involved)
    - How did the lower courts rule?
    - Why was the ruling controversial? What are the implications for the future?
  4. Familiarize students with issues related to the water cycle, water law, and bottled water. Depending upon your students, you may wish to present the information in a lecture format and/or assign independent readings. If readings are assigned, a glossary and optional worksheets, intended to help students find the most important ideas, are included.

### Resources

- U.S.G.S., Water Science School  
<http://ga.water.usgs.gov/edu/>
- EPA, *Bottled Water Basics*  
[http://www.epa.gov/ogwdw000/faq/pdfs/fs\\_healthseries\\_bottledwater.pdf](http://www.epa.gov/ogwdw000/faq/pdfs/fs_healthseries_bottledwater.pdf)
- MDEQ, Michigan Environmental Education Curriculum Support  
[http://www.michigan.gov/deq/0,1607,7-135-3307\\_3580\\_29678---,00.html](http://www.michigan.gov/deq/0,1607,7-135-3307_3580_29678---,00.html)
- State Bar of Michigan, "Everything Old Is New Again," *Bar Journal*, November 2005  
<http://www.michbar.org/journal/pdf/pdf4article930.pdf>
- A Look at Lumbering in Michigan, *Michigan History Online*  
<http://www.michiganhistorymagazine.com/extra/logging/index.html>

### Main Ideas

- Surface water and ground water are linked through the hydrologic cycle.
- Fresh water is an important resource in Michigan. Water is so abundant that until recently, few laws have regulated water use, especially when compared with states in the West. The Michigan Department of Environmental Quality (MDEQ) is the body that regulates water use for the State.
- Under Michigan law, landowners do not own the water adjacent to or underneath their land. But they may make "reasonable use" of the water for their own purposes. Increasingly, multiple uses (e.g. manufacturing, recreation, agriculture, public utilities) conflict with one another.
- The public has certain rights on navigable waterways—those defined as being capable of and having been used for commerce, travel, or trade. Waterways used during the lumbering era in Michigan are considered navigable.
- The Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA) set federal standards for drinking water. The FDA regulates bottled water as a packaged food.

5. Ask students to select their roles. Depending upon the size of the class, you may vary the number of students in each role. If the class has few students, the roles of court crier, court clerk, and public information officer can be combined.
  - Justices (7 or any odd number)
  - Court crier (1)
  - Court clerks (1–2)
  - Public information officers (1–3)
  - Attorneys for the appellant (3–6)
  - Attorneys for the appellee (3–6)
  - Journalists (2 and above)
6. Distribute the tip sheets to the justices and attorneys and make the briefs for both sides available to all the groups. The justices and employees of the Court, the attorneys for each side, and the journalists should gather as groups to discuss the case.
  - Journalists may listen to the conversations of the other groups to write their news stories. They may obtain statements from the attorneys and speak with the public information officers; however, the public information officers may not discuss which arguments the justices favor.
  - Justices should select a chief justice to lead this discussion and other proceedings of the Court. Then, the justices and the employees of the Court should examine the issues and study important precedents, which may be listed in the briefs. Each justice should develop questions to ask the attorneys. The justices may not speak with the attorneys or the journalists.
  - Public information officers should act as liaisons between the Court and the journalists. In addition, they should prepare their press release about the case.
  - Attorneys should select three students to argue for each side. Then, they should examine the arguments, including important precedents, which may be listed in the briefs. If possible, they should develop tests or rules for the Court to adopt.

### **Resources**

- Structured Academic Controversy (SAC), TeachingHistory.org  
Detailed handouts and instructions for engaging students in a type of debate and problem-solving that encourages participants to see both sides of an issue.  
<http://teachinghistory.org/teaching-materials/teaching-guides/21731>
7. After students have prepared their arguments, questions, etc., arrange the classroom to replicate the Michigan Supreme Court courtroom. Then, undertake oral argument, following the procedures outlined in Order of Business. Allow 10–15 minutes for each side's arguments, including questions from the justices and rebuttal. If the justices still have relevant questions after the full time has elapsed, you may allow the attorneys to continue answering questions.
    - Journalists should listen carefully to the arguments and then write a follow-up news story about the impact of the Court's decision.
    - Justices should listen carefully to the arguments and ask questions to clarify issues. After arguments, the justices should meet to discuss and come to a decision. Once the Court has a majority decision, the author of the majority opinion should announce the decision and reasoning. Justices with dissenting



opinions should do the same. Note: The Michigan Supreme Court only releases opinions in writing. The Court does not announce opinions from the bench.

- Attorneys should make their best arguments for each issue and answer the justices' questions as completely as possible. You may wish to allow the attorneys to confer on their answers.

8. Debrief the experience with the students.

- What went well? What could have gone better or differently?
- What surprised you about the arguments?
- What were the similarities/differences in the arguments?
- What were the most forceful arguments and why?

You may also wish to discuss the outcome of the case at the Michigan Supreme Court. Likely, the outcome of the actual case will be much different than that of your classroom, because these materials assume that the plaintiffs had the right to sue, or in legal terminology, "had standing." The Michigan Supreme Court, on the other hand, ruled that the plaintiffs only had the right to sue on issues related to property that they owned along the Dead Stream.

## Resources

- MSC Opinion, MCWC v Nestlé (2007)  
[http://publicdocs.courts.mi.gov:81/opinions/final/sct/20070725\\_s130802\\_168\\_nestle130802-op.pdf](http://publicdocs.courts.mi.gov:81/opinions/final/sct/20070725_s130802_168_nestle130802-op.pdf)

You may also wish to update the students on the status of the case. In 2009, Michigan Citizens for Water Conservation (MCWC) and Nestlé settled out of court. According to the MCWC, the amount of water pumped was reduced by almost half, and lower pumping levels are allowed during spring and summer.

Michigan Citizens for Water Conservation  
<http://www.savemiwater.org/mcwcvsnestle/>

Stop Nestle Waters  
<http://stopnestlewaters.org/tag/mecosta-county>

## Tips for Teachers

- For added pomp and circumstance, swear in the lawyers and justices using the official oaths. For more information, see the lesson on legal ethics in the Careers in Law and Legal Studies curriculum guide, <http://courts.mi.gov/education/learning-center/curriculum-resources/pages/career-planning.aspx>.
- It also helps to ask students to dress for their roles, including conservative business attire for the attorneys and robes for the justices. Graduation gowns and choir robes make good stand-ins for judicial robes.
- To lend authenticity to the briefs, copy the cover of the appellant's brief on blue paper and the appellee's brief on red, as is the practice of the Michigan Supreme Court clerk's office.
- During oral argument, the justices sit according to seniority. The chief justice sits in the center. Associate justices are seated according to seniority, alternating to the right and left of the chief justice. Thus, the justice with the most seniority sits to the chief justice's immediate right and the justice second in seniority is on the chief justice's left. The pattern continues in this way, ending with the justice having the least seniority sitting to the chief justice's far left. Using the age of the students is an easy way to determine "seniority" for moot court.
- Consider placing name cards on the bench to assist attorneys in addressing the justices during their argument.
- The briefs list two issues, so it is easiest to divide the arguments according to the issues. A third student on each team can argue as an *amicus curiae*, and a fourth student may make the rebuttal for the appellant.
- Although the justices are allowed to ask questions at any time during the argument, justices in moot court often find it difficult to interrupt their peers, waiting till the end to ask their questions.
- Justices should be prepared for persuasive arguments to sway their preliminary votes.
- If the moot court will be held in front of spectators, students may find it helpful to stage a dry-run, completing the formalities only, or a mini-moot court, allowing students to make limited arguments.

## Statement of the Case

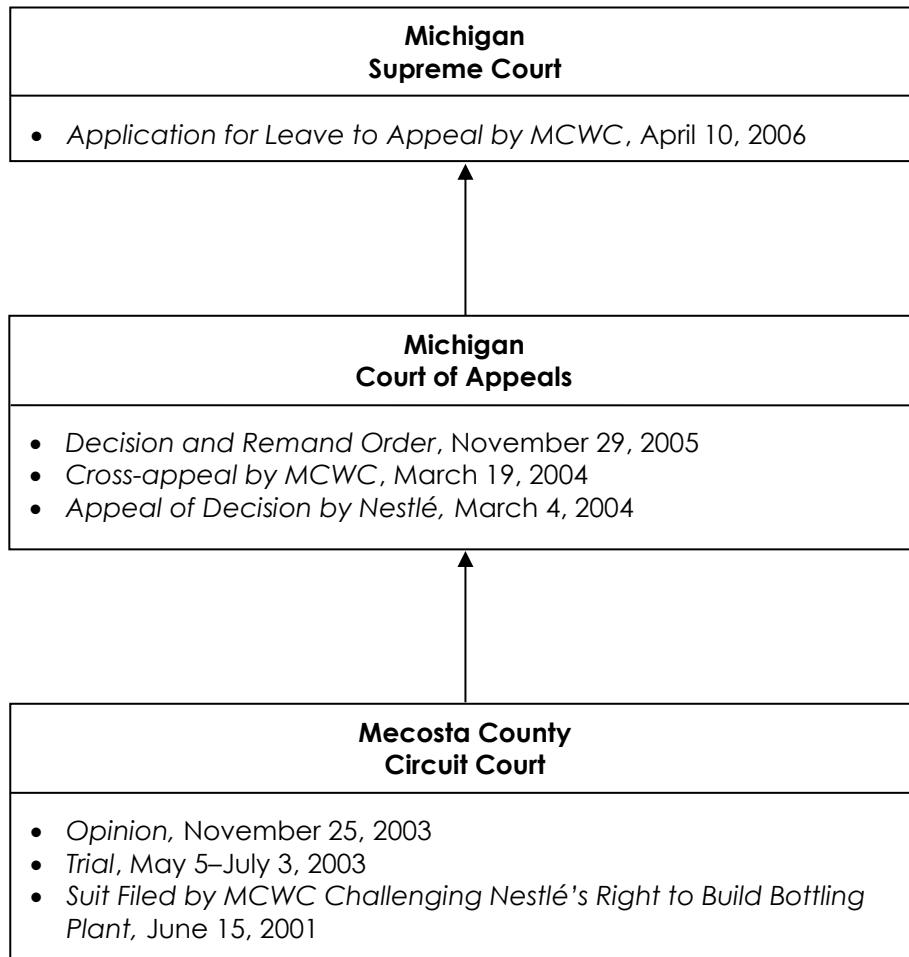
In 2000, Nestlé Waters North America Inc. began taking steps to construct a spring-water bottling plant in Mecosta County, and the corporation purchased the ground water rights to property in an area known as Sanctuary Springs. Shortly after Nestlé announced its plans, the nonprofit corporation Michigan Citizens for Water Conservation (MCWC) formed to represent the interests of local riparian property owners and other interested persons. Nestlé installed four wells on the Sanctuary Springs site and obtained permits to use the wells from the Michigan Department of Environmental Quality (MDEQ). The combined maximum pumping rate permitted for the four wells was 400 gallons per minute. In the summer of 2001, Nestlé began to construct its bottling plant.

In June 2001, MCWC filed a lawsuit challenging Nestlé's right to build and operate the spring-water bottling plant. At a 2003 trial, the Mecosta County Circuit Court determined that Nestlé's operations would have a harmful impact on the environment near the Sanctuary Springs site and ruled that Nestlé had to stop all pumping operations within 21 days. Nestlé appealed, and the Michigan Court of Appeals issued an order staying (stopping) the trial court's 21-day deadline. Although the Court of Appeals allowed the operations, it limited pumping to 250 gallons per minute.

In its written opinion, the Court of Appeals reversed part of the trial court's ruling, concluding that the trial court applied the wrong legal standard when it analyzed whether Nestlé could operate its spring-water bottling plant. The Court of Appeals then applied what it determined was the proper standard, ruling that Nestlé could pump an amount of water that left an adequate water supply for the plaintiffs' various uses. The Court of Appeals remanded (sent back) the case to the trial court, directing the court to make additional findings of fact to determine what level of pumping would be reasonable. In a dissenting opinion, one judge would have held that the plaintiffs lacked standing (the right to sue) under the Michigan Environmental Protection Act (MEPA). But the two other judges (the majority) disagreed, finding that the plaintiffs had standing on all the natural resources at issue because of the nature of the ecosystem, the hydrologic interactions, and the pumping activities that were affecting the resources in question.

## Case History

### MCWC v Nestlé Waters



## Questions Involved

### First Issue

Did the Court of Appeals follow water law precedent when adopting a balancing test to settle disputes between water users?

### Second Issue

Did the Trial Court and Court of Appeals err when limiting the public trust doctrine to bodies of water with the capacity to float large mill logs (or sustain commercial shipping)?

## **Job Description**

### **Justices**

The Michigan Supreme Court is the highest court in the state. It is the last word on the law in the State of Michigan. All lower courts must follow the precedent set by the Supreme Court.

Oral arguments are the only public portion of the Court's decision-making process. Proceedings are based upon the evidence presented at the trial courts. There are no witnesses or juries.

The justices will:

- Select a chief justice from the seven-member panel. The chief justice leads proceedings and conferences.
- Review the case and think of questions to ask the attorneys.
- Listen to the arguments and ask questions at any time.
- Discuss the case with other justices to determine if the lower court's decision should be upheld or overturned. The final decision will be based upon the majority, and dissents are allowed.
- Announce the decision with reasons.

## **Job Description**

### **Attorneys for the Appellant**

The Michigan Supreme Court is the highest court in the state. It is the last word on the law in the State of Michigan. All lower courts must follow the precedent set by the Supreme Court.

Oral arguments are the only public portion of the Court's decision-making process. Proceedings are based upon the evidence presented at the trial courts. There are no witnesses or juries.

Attorneys for the appellant will:

- Discuss the case and develop arguments to persuade the Supreme Court to overturn the lower court's decision.
- Select three or four students to present your arguments and rebuttal within the time allowed.

## **Job Description**

### **Attorneys for the Appellee**

The Michigan Supreme Court is the highest court in the state. It is the last word on the law in the State of Michigan. All lower courts must follow the precedent set by the Supreme Court.

Oral arguments are the only public portion of the Court's decision-making process. Proceedings are based upon the evidence presented at the trial courts. There are no witnesses or juries.

Attorneys for the appellee will:

- Discuss the case and develop arguments to persuade the Supreme Court to affirm the lower court's decision.
- Select three students to present your arguments within the time allowed.



## **Job Description**

### **Court Crier**

The Michigan Supreme Court is the highest court in the state. It is the last word on the law in the State of Michigan. All lower courts must follow the precedent set by the Supreme Court.

Oral arguments are the only public portion of the Court's decision-making process. Proceedings are based upon the evidence presented at the trial courts. There are no witnesses or juries.

The court crier will:

- Review the case and work with the justices to develop questions.
- Open the session with the crier's speech:

Hear ye, Hear ye! The Honorable Chief Justice and Justices of the Supreme Court of Michigan. All persons having business before this honorable Court are admonished to draw nigh and give their attention, for the Court is now sitting. God save the United States, the State of Michigan, and this honorable Court.

- Listen carefully to the arguments.
- Give input to the justices before they go to conference.
  - What do you think is the most compelling argument?
  - How do you think the justices should vote?
  - What do you think you may need to clarify for the justices?

## **Job Description**

### **Court Clerks**

The Michigan Supreme Court is the highest court in the state. It is the last word on the law in the State of Michigan. All lower courts must follow the precedent set by the Supreme Court.

Oral arguments are the only public portion of the Court's decision-making process. Proceedings are based upon the evidence presented at the trial courts. There are no witnesses or juries.

The court clerks will:

- Review the case and work with the justices to develop questions.
- Listen carefully to the arguments.
- Give input to the justices before they go to conference.
  - What do you think is the most compelling argument?
  - How do you think the justices should vote?
  - What do you think you may need to clarify for the justices?

## **Job Description**

### **Public Information Officers**

The Michigan Supreme Court is the highest court in the state. It is the last word on the law in the State of Michigan. All lower courts must follow the precedent set by the Supreme Court.

Oral arguments are the only public portion of the Court's decision-making process. Proceedings are based upon the evidence presented at the trial courts. There are no witnesses or juries.

The public information officers will:

- Review the case and write a press release, describing the questions at issue and highlighting the aspects most interesting to the public.
- Work with the journalists to clarify their questions about the issues, discussing the case with the court clerks and justices as necessary.
- Distribute the press release to the journalists and any spectators at the arguments.

## **Job Description**

### **Journalists**

The Michigan Supreme Court is the highest court in the state. It is the last word on the law in the State of Michigan. All lower courts must follow the precedent set by the Supreme Court.

Oral arguments are the only public portion of the Court's decision-making process. Proceedings are based upon the evidence presented at the trial courts. There are no witnesses or juries.

The journalists will:

- Review the case and press release written by the public information officers.
- Write a news story about the case before oral argument.
- Attend oral arguments, listening carefully and taking notes.
- Write a news story about the decision and its potential impact.

## Tips for Legal Research

Legal research can be fascinating but technical. Law school courses are devoted to the topic, and legal research can take years to master. The following resources can help you get started.

What Do Those Letters & Numbers Mean?

### Case Names

<i>People</i>	<i>v</i>	<i>Stevens,</i>	460	Mich	626	(1999)
Plaintiff	Versus	Defendant	Volume	Court	First Page	Year Decided

F#d            United States Court of Appeals; number indicates which circuit  
Mich          Michigan Supreme Court  
Mich App     Michigan Court of Appeals  
NW2d        Michigan Supreme Court; "parallel citation," leading to the same opinion as Mich  
US            United State Supreme Court

### Codes (Laws)

MCL	780.	656
Code	Section	Subsection

18	USC	§	3109
Title	Code		Section

§            Section  
MCL        Michigan Compiled Laws  
MCLA      Michigan Compiled Laws Annotated  
Mich Const Michigan Constitution  
USC        United States Code  
US Const   United States Constitution

### Try These Web Sites

FindLaw

<http://www.findlaw.com/>

Legal Information Institute, Cornell Law School

<http://www.law.cornell.edu/>

Michigan Legislature

<http://www.legislature.mi.gov/>

Opinion Search for the Michigan Supreme Court and Court of Appeals

[http://courts.mi.gov/opinions\\_orders/opinions\\_orders/](http://courts.mi.gov/opinions_orders/opinions_orders/)

Oyez: U.S. Supreme Court Media

<http://www.oyez.org/>

# Guide for Attorneys

## Style of Oral Argument

Argument is formal, polite, and serious.

- Court rules require that attorneys treat everyone involved in a case with respect.
- When addressing members of the Court by name, always use the format "Chief Justice [last name]" or "Justice [last name]." You may also use "Your Honor" or "Your Honors."
- Justices typically address the attorney before them as "Counselor."
- Always refer to others involved in the case, including clients and other attorneys, as "Mr. [last name]" or "Ms. [name]."
- Avoid using jokes since they may be misinterpreted as a lack of respect.
- Always say "thank you" at the end of your argument.

Prepare a well-organized set of notes but be prepared to speak "off the cuff."

- You may not read directly from a prepared script.
- Time passes quickly, especially with questions from the Court. Be prepared to skip over much of your planned argument and stress your strongest points.

Address issues from your opponent's argument.

- If your opponent has a strong point, plan to address that issue at the beginning of argument or rebuttal argument.
- If your opponent answered a point weakly or incorrectly, plan to cover that issue during your argument.

There is no requirement that you use all your allotted time. If you have made your point, you may thank the Court and then stop.

## Content of Oral Argument

In a divided argument, inform the Court of the argument plan. For example, "I will cover the Fourth Amendment aspects of this case and counsel for the *amicus* will argue the Fifth Amendment issues."

Argument focuses on legal theories and interpretation of the law.

- The Court relies upon the evidence presented at trial. It only rules on the facts of a case if they are clearly erroneous and have no evidence to support them. The facts are not disputed in this case.
- Be prepared to explain what public policy issues are involved and what other impacts would happen when ruling one way or another. The Supreme Court only accepts cases of great importance to the general populace.

Be prepared to offer "bright line" rules and standard tests.

- The standard should be clear and enforceable by lower courts, which must follow the precedent set by the Michigan Supreme Court.

- For example, a rule could state that the police must allow “15 seconds or more” before entering after announcing themselves. How will this be resolved when the suspect claims that only 13 seconds passed? And if the difference is only one second, is that “close enough” or will the issue have to be litigated?

Avoid saying “I think” or “I believe.” Instead, use “we argue” or “our position is.”

Concluding statement

- Develop a one-sentence theme that ties together your arguments.
- Do not restate your entire argument. Instead, say why the Court should adopt your view.

## **General Tips**

Stand straight, make eye contact with all justices, be clear and persuasive, and believe in the argument you are presenting.

Speak clearly and distinctly.

- Speak loudly enough to be heard by everyone in the courtroom.
- Use a natural (yet formal) speaking style. Talking slowly and carefully will help calm your nerves.

Work to control your fidgets, nervous tics, and distracting mannerisms.

- Practice your argument in front of someone who will give you honest, helpful feedback.
- Use appropriate hand gestures but avoid pointing at the justices with your finger, a pen, or another object.
- Remove any coins, keys, cell phones, or other items that may rattle in your pockets.
- Allow yourself short, silent pauses as you speak instead using fillers such as “um” or “you know.”

Do not make faces, sigh, shake your head, or do anything else distracting during your opponents' arguments or when listening to a justice's question. This is considered disrespectful.

## **Questions from the Justices**

The justices will have specific questions related to your case.

- The justices may interrupt your argument to ask their questions. If so, stop speaking immediately—even mid-sentence, listen carefully, and then answer the question. Questions are important clues about the issues in which the Court is most interested.

- Try to answer the Court's questions directly. Begin with "yes," "no," or "I respectfully disagree," and then expand upon your answer before returning to your argument. For example:
  - "No, your Honor, because . . ."
  - "Appellant respectfully disagrees, your Honor. This case differs from \_\_\_\_\_ v \_\_\_\_\_, since the facts in that case involved [a warrantless search], [a known violent offender who was known to be armed and dangerous] . . ."
- Although oral argument requires quick thinking, you should admit politely if you do not know the answer to a question.
- If a justice asks a hypothetical question, you should respond to that question with the facts given, even if they are different from your case.
- A justice may ask: "Do any cases from the Court support your position?" Be careful to cite only those cases that truly support your position. Do not distort the meaning of a precedent.

If other justices ask questions before you complete your answer to the first justice, use your best judgment in answering. Depending upon the situation, you may do either of the following:

- Answer the follow-up question but indicate that you will return to the prior question.
- Politely indicate that you will return to the follow-up question after concluding your answer to the first justice's question.

When a justice makes a point that is against your case, admit that the justice is correct and then proceed with your argument.



# Guide for Justices

## Seniority and Leadership of the Court

In Michigan, members of the Supreme Court appoint a chief justice from amongst themselves.

- The chief justice leads proceedings and conferences of the justices.
- Any of the justices may serve as chief justice if a majority of the Court agrees.
- You may nominate and vote for yourself.

Justices file into the courtroom in the order they will be seated.

- The chief justice sits in the center.
- Associate justices are seated according to seniority, alternating to the right and left of the chief justice.

## Style of Oral Argument

Argument by counsel is formal, polite, and serious.

- When addressing members of the Court by name, attorneys will use the format "Chief Justice [last name]" or "Justice [last name]." They may also use "Your Honor" or "Your Honors."
- Justices typically address the attorney before them as "Counselor."
- When referring to parties in the case, use the formal "Mr. [last name]" or "Ms. [name]."
- Attorneys will speak from notes, not a prepared script.

Speak clearly and distinctly.

- Speak loudly enough to be heard by everyone in the courtroom.
- Use a natural (yet formal) style.

## Content of Oral Argument

Argument focuses on legal theories and interpretation of Michigan law.

- The Court relies upon the evidence presented at trial. It only rules on the facts of a case if they are clearly erroneous and have no evidence to support them.
- Concentrate on public policy issues and what impact particular rulings would have. The Supreme Court only accepts cases of great importance to the general public.

Counsel may offer suggestions for "bright line" rules and standard tests to guide the lower courts in future rulings.

- The Court must assure that the standards are clear and enforceable.
- For example, a rule could state that the police must allow "15 seconds or more" before entering after announcing themselves. How will this be resolved when the

suspect claims that only 13 seconds passed? And if the difference is only one second, is that "close enough" or will the issue have to be litigated?

Counsel may discuss rulings from lower courts, other states, or federal appellate courts.

- These rulings are not binding upon the Court in reaching its decision.
- The Court may look to decisions from other courts for guidance, and to see what arguments were used to reach their conclusions.
- The Court should also see if they are helpful or "instructive" in interpreting Michigan law.

### **Timing of Oral Argument**

Oral arguments are strictly timed, and the Court tries to keep to that schedule.

- If you are asking a question when time is up, you may complete your question and the attorney may respond. If the justices have additional questions, they may ask them as well.
- At the end of the time, the chief justice should acknowledge the attorney by saying, "Thank you, and sir," or "Thank you, ma'am."

### **Questions from the Justices**

Attorneys will attempt to anticipate your questions and discuss those ideas in their arguments. You may have further questions, which you may ask at any time during the argument.

- As you prepare, write down a list of issues and questions and listen for these ideas during argument. If the attorneys have satisfied your questions, either through their arguments or by answering another justice's question, you do not need to repeat the issues.
- The argument may lead you to other questions or a need for clarification. Be prepared to think of new questions during argument.
- The attorneys' arguments will focus on interpreting the law and legal theories. Your questions may cover points of fact or procedure as long as they help you understand how the case fits within the argument.
- Your attitude and questions will not necessarily indicate the direction of your potential vote. Justices do not reveal their opinions about a case publicly until the opinion is released in writing.
- You may ask hypothetical questions.

You may interrupt an attorney *at any time* and expect that the attorney will stop and listen.

Although you should always remain courteous to the attorneys, you may ask questions that are difficult and that reveal weaknesses in the argument.

## Order of Business

1. The court crier bangs the gavel, and everyone in the courtroom stands. The justices file behind the bench in seniority order with the Chief Justice in the center. The court crier opens with the crier's speech.

Hear ye, Hear ye! The Honorable Chief Justice and Justices of the Supreme Court of Michigan. All persons having business before this honorable Court are admonished to draw nigh and give their attention, for the Court is now sitting. God save the United States, the State of Michigan, and this honorable Court.

The court crier bangs the gavel, and everyone sits.

2. The chief justice welcomes everyone and calls a case to be heard. He or she might say:

Good morning, and welcome to the session of the Michigan Supreme Court on [date]. Our case is [case name]. Counsel for the appellant, you may begin.

3. The attorney for the appellant comes forward, introduces himself/herself and co-counsel, and requests time for rebuttal by saying:

May it please the Court, Chief Justice [last name], Justices. I am [first name, last name] and this is [names of other attorneys] for [name of appellant]. I would like to save \_\_\_\_ minutes for rebuttal.

After the introduction, counsel presents the argument for initiating the appeal.

Other attorneys for the appellant introduce themselves more briefly.

As my co-counsel stated, my name is [name], and I will argue the issue of [legal issue].

4. The attorney for the appellee introduces himself/herself and presents that side's argument.

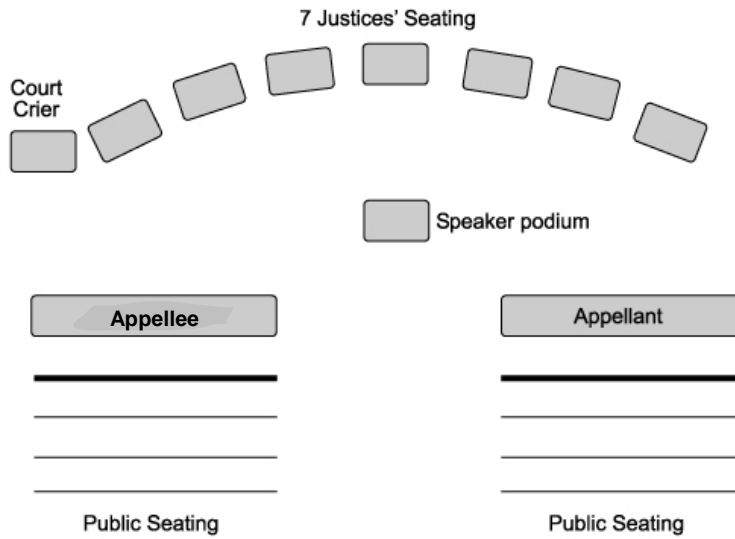
May it please the Court, Chief Justice [last name], Justices. I am [first name, last name] and this is [names of other attorneys] for [appellee name].

Other attorneys for the appellee introduce themselves more briefly.

As my co-counsel stated, my name is [name], and I will argue the issue of [legal issue].

5. One attorney for the appellant uses the remaining time for rebuttal.
6. Afterward, the justices meet in conference for a vote.

## The Michigan Supreme Court Courtroom (Courtroom Seating Chart)



## Glossary

§. See section.

**Accretion.** The act of growing usually applied to the slow accumulation of land by natural causes, such as by rivers or the sea.

**Affirm.** Agree with a lower court's decision. The appellate court may affirm or reverse a decision.

**A fortiori** /ay for-shee-yo-ray/. "Much more."

**Allocation.** Assignment or allotment. Thus, in an "allocation law" state, riparian owners would each be assigned a certain amount of water for their use. See also Correlative rights and Reasonable use.

**Amicus curiae** /a-mee-cuhs kyur-ee/. Literally, friend of the court. In a case with broad public interest, a person or organization with strong interest in or views on the subject of an action, but not a party to the action, may petition a court for permission to file a brief on behalf of its own views. For example, a civil rights organization might submit a brief in a civil rights case.

**Appeal.** A review of the decision of a lower court.

**Appellant.** In a case on appeal, the party that appealed the lower court's decision. In some courts, this side is called the "petitioner."

**Appellate court.** A court that reviews the decisions of lower courts.

**Appellee.** In a case on appeal, the party that did not appeal the lower court's decision. In some courts, this side is called the "respondent."

**Appendix.** A document on file in which the important parts of the record have been assembled for the convenience of the Court.

**Application for leave to appeal.** A request to an appellate court for an appeal.

**Balancing test.** A constitutional doctrine in which the court weighs the right of an individual against the rights of a state to protect its citizens against the invasion of their rights.

**Brief.** A written statement prepared by counsel arguing a case in court. It contains a summary of the facts of the case, the pertinent laws, and an argument of how the law applies to the facts supporting counsel's position.

**CFR.** Code of Federal Regulations. These are the general and permanent rules of the executive departments and agencies of the Federal Government. Title 21 of the Code

of Regulations governs food and drugs. Bottled water is regulated by the Food and Drug Administration (FDA) as a packaged food.

**Chief Justice.** A justice who leads the Supreme Court. In Michigan, the justices appoint one of their colleagues to serve as chief justice for a two-year term.

**Cite.** Refer to as an authority, such as in a footnote.

**Clearly erroneous.** The rule providing that findings of a trial court will not be set aside unless they are based upon a substantial error in proceedings or misapplication of the law.

**Closed-ended question.** A question with a “yes” or “no” answer.

**Code.** A collection of laws.

**Common law.** Rules and principles for government derived from custom, dating back to English and colonial law; the body of law developed through judicial decisions.

**Conference.** Weekly meetings of the justices where they discuss applications for leave to appeal, opinions, and administrative matters.

**Cooley, Thomas M.** A justice of the Michigan Supreme Court during the 1850s–1860s for whom Cooley Law School is named. Justice Cooley authored many important opinions during his time on the Court.

**Convey.** To transfer to another.

**Corporeal property.** Property that can be touched or has a body, as opposed to property that is incorporeal and cannot be touched. For example, a house is corporeal property but the annual rent payable is incorporeal.

**Correlative rights.** Refers to the doctrine applied to riparian owners and their rights with respect to lower or adjacent riparian owners. A variant of reasonable use that allows water to be transported away from the riparian land if other riparians are fully supplied with water. See also Allocation and Reasonable use.

**Court clerk.** Maintains court records with the assistance of staff.

**Court rules.** Rules adopted by the Michigan Supreme Court to govern Michigan's legal system and the judges, lawyers, and other professionals who are charged with preserving the integrity of that system. Michigan Court Rules cover many topics, including specific court procedures, civil procedures, criminal procedures, rules of evidence, and the conduct of judges and lawyers. They are often cited in the style of the following example: MCR 1.101. See <http://courtofappeals.mijud.net/rules/public/default.asp>.

**Crier.** Opens and closes all sessions of the Court and provides security in the courtroom.

**De novo** /dee no-vo/. Anew; a second time.

**Divided argument.** More than one counsel argues for the appellant or appellee.

**Docket number.** A number assigned to a case to distinguish it from all other cases filed with a court.

**Et seq.** /et see-quen-chee-ah/. An abbreviation, meaning “and the following.”

**Fee simple.** Real estate ownership in which a single owner has an interest in the land.

**Fiat.** An authoritative or arbitrary decree.

**Floating log test.** The public has rights to use navigable waters—those waters which can be and have been used for travel, trade, and commerce. Lumbering was an important form of commerce in the state’s early history (1840s–1900). In those days, logs were transported to sawmills by floating them down rivers and other waterways, so the ability to float logs became an important test to determine navigability. Thus, if a mill log can float down a waterway, then the waterway may be determined to be navigable and, thus, public (not private). Note: Although some “floatable waters” may not be “strictly navigable” (able to support boat or vessel traffic), they are still considered navigable, and public. See also Navigable inland stream, Navigable waters, and Public trust doctrine.

**Holding.** The legal principle to be drawn from a decision of a court.

**Hypothetical question.** A question asked with a set of circumstances given. This type of question may include the phrase, “What if.”

**Idem (Id).** “The same.” Typically used to indicate a previous reference in a citation.

**Inapposite.** Not pertinent.

**Infra.** “Below.” The opposite of *supra*.

**Injunction.** A court order prohibiting someone from doing a specified act or commanding someone to undo some wrong.

**Injunctive relief.** To stop a wrong through an injunction.

**Inter alia** /in-ter ah-lee-ah/. “Among other things.”

**Jurisdiction.** A court’s authority to decide cases.

**Justice.** A judge of the Supreme Court. Seven justices sit on the Michigan Supreme Court. They are elected for eight-year terms. Justices are sometimes referred to as “members of the Court,” and they refer to each other as “colleagues.”

**Leave to appeal.** Permission to go to a higher court to review the decision of a lower court. The Michigan Supreme Court “grants leave to appeal” in the cases that it chooses to hear.

**Littoral.** Related to the bank of a lake. See also Riparian.

**MCL.** Michigan Compiled Laws. The Michigan Legislature maintains an online version: <http://www.legislature.mi.gov/>.

**Meander.** (1) To follow a winding course. (2) To survey and map a stream according to its meanderings, windings, or turnings.

**Michigan Court of Appeals (COA).** The intermediate appellate court in Michigan that reviews the decisions of the state's lower courts. Only the Supreme Court may overrule the Court of Appeals. It is sometimes referred to as the “COA.”

**Michigan Department of Environmental Quality (MDEQ).** Department under the executive branch that directs environmental regulation programs.

**Michigan Environmental Protection Act (MEPA).** A state law passed in 1970 to protect the environment, now known as the Natural Resources Environmental Protection Act. MCL 324.1701(1) states: “The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.”

**Michigan Supreme Court (MSC).** The highest court in the State of Michigan. Its decisions are binding on lower courts, meaning lower courts must follow the ruling in similar or identical cases. It is sometimes referred to as “the Court” or the “MSC.” See also—Chief Justice, Justice, and Precedent.

**Mill log.** A log, about 20–40 feet long, intended to be sawn into boards.

**Motion.** An application made to a court or judge to obtain an order to direct an action in favor of the applicant. For example, a “motion for a summary disposition” is a pretrial request for a judge to rule in favor of the side requesting the motion since the answer to the dispute should be obvious.

**Natural flow.** Under this doctrine riparian owners may not substantially reduce the quantity or quality of water in a stream and may not transport water to land beyond the riparian land. See also Reasonable use.

**Navigable inland stream.** In Michigan, any stream that (1) has been declared navigable by the Michigan Supreme Court; (2) is included within the navigable waters of the United States by the U.S. Army Engineers for administration of laws enacted by Congress; (3) floated logs during lumbering days (1840s–1900) or of the capacity to do



so generally in its natural state; (4) has at least an average flow of 41 cubic feet per second, and average width of 30 feet, and average depth of one foot, capacity of floatage during spring, used for fishing by the public for an extended period, and stocked with fish by the state; (5) has been or is navigable by boat for purposes of commerce or travel; or (6) was meandered by the General Land Office Survey in the mid-1800s. See also Floating log test, Navigable waters, and Public trust doctrine.

**Navigable waters.** Water which in its natural state is capable of and has been used for commerce, travel, or trade. Under the public trust doctrine, the public has rights on navigable waters. See also Floating log test, Navigable inland stream, and Public trust doctrine.

**Open-ended question.** A question that requires an explanation rather than “yes” or “no.”

**Opinion.** The written statement by a judge or court of the decision reached in a case, describing the law as applied to the case and the reasons upon which the judgment is based.

**Oral argument.** Conversation between attorneys and judges of an appellate court, explaining reasons for affirming or reversing a decision; generally limited in time by a court rule.

**Order.** Direction of a court or judge made in writing and not included in a judgment, which determines a point or directs a step in the proceedings. An application for an order is a motion.

**Per curiam** /per kyoor-ee-am/. By the court. A phrase that distinguishes an opinion of the whole court from an opinion written by one judge. Sometimes it denotes a brief announcement of the disposition of a case by court not accompanied by a written opinion.

**Per se** /per say/. “By itself,” or “inherently.”

**Precedent.** A court decision that serves as an example for identical or similar cases. Courts attempt to decide cases on principles based in prior cases that are close in facts or legal principles.

**Prima facie** /pī-mah fā-shah/. “At first sight,” “on the face of it,” or “presumably.”

**Public Information Office.** Serves as the primary contact with the media and public to provide information about Court developments and actions.

**Public trust doctrine.** Provides that submersed or submersible lands are preserved for public use in navigation, fishing, and recreation. The state is responsible for protecting the public's rights to use the soil beneath navigable waters. In Michigan, the state's duty dates to the Northwest Ordinance of 1787, a law written to bring the Northwest Territory into the United States. The Northwest Ordinance declared that “[t]he navigable

waters leading into the Mississippi and the Saint Lawrence, and the carrying places between, shall be common highways, and forever free[.]” Art. IV Northwest Ordinance 1787.

**Publici juris.** “Public right.”

**Reasonable use.** A riparian owner may use the water as long as the use does not affect the quantity or quality of water available to a lower riparian owner.

**Record.** An official written account of a court proceeding designed to be permanent evidence. The term usually means accounts, correspondence, memorandums, tapes, disks, papers, books, transcriptions, or other documents.

**Remand.** To send back to the lower court from which it was appealed, with instructions as to what further proceedings should be had there.

**Remedy.** The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.

**Res judicata** /rees joo-duh-kay-tuh/. A thing or matter settled by judgment. This rule bars an appeal on the basis of the same issue already having been decided by the Court.

**Restatement.** “Model laws” published in book form that are drafted by prestigious committees. States look to the Restatements when drafting their own laws, and courts sometimes cite them as non-binding guidance on an issue when no current law or precedent is available.

**Riparian.** Related to the bank of a natural water course, such as a river or sometimes a lake.

**Riparian right.** A right of owning riparian land, allowing the owner to use or access the shore, bed, or water.

**Section (§).** In codes, statutes, or other writings, the smallest numbered subdivision. Sometimes called “articles” or “paragraphs.”

**Settled law.** See *Stare decisis*. See also Precedent.

**Shingle bolt.** Wood cut to 16–18 in. for making split wood shingles, such as cedar shake shingles.

**Situs** /see-tuhs/. Location of property.

**Stare decisis** /sta-ree dee-sī-sihs. To abide by decided cases and stand by precedent.

**Statute.** A law; a written enactment of a legislative action.

**Stay.** A stopping through court order.

**Supra.** "Above." The opposite of *infra*.

**Trial court.** A lower court, such as district court, circuit court, or probate court.

**Usufruct.** The right to use or enjoy something.

**Wharf out.** Build a dock or similar structure into a body of water.

## Further Resources

### Michigan Courts, Cases, & Law

Michigan Courts

<http://courts.mi.gov/>

Includes links to the Michigan Supreme Court, Court of Appeals, trial courts, and the State Court Administrative Office.

Court Forms, State Court Administrative Office

<http://courts.mi.gov/Administration/SCAO/Forms/>

Includes forms used by state courts.

Opinion Search for the Michigan Supreme Court and Court of Appeals

[http://courts.mi.gov/opinions\\_orders/opinions\\_orders/](http://courts.mi.gov/opinions_orders/opinions_orders/)

Includes published opinions since 2001. Use "field search" to look for party names or case types. "Text search" allows keyword searching of the opinions.

Library of Michigan – Law Library

[http://www.michigan.gov/mde/0,1607,7-140-54504\\_50206\\_18639---,00.html](http://www.michigan.gov/mde/0,1607,7-140-54504_50206_18639---,00.html)

Scroll down for resources and research guides.

Michigan Legislature

<http://www.legislature.mi.gov/>

Offers searchable versions of the Michigan Constitution and Michigan Compiled Laws. The Michigan "knock and announce statute" is MCL 780.656.

### U.S. Supreme Court, General

SCOTUS Blog

<http://www.scotusblog.com/>

In-depth information about current cases and events at the U.S. Supreme Court. Synopses of cases are found under Plain English.

U.S. Supreme Court

<http://www.supremecourt.gov/>

Official website of the U.S. Supreme Court. Includes a calendar of oral arguments, briefs, court rules, and information about the Court.

### Legal Research, General

Garner, Bryan A. (ed.). *Black's Law Dictionary*, 8th ed. Egan, MN: Thomson West, 2004

Handbook of Legal Terms, Michigan Judicial Institute

<http://courts.michigan.gov/mji/resources/holt/holt.htm>

Legal Information Institute

<http://www.law.cornell.edu/>

Sponsored by the Cornell University Law School, this web site offers links to free, searchable material at federal and state levels. Includes a free legal dictionary/encyclopedia.

Lexis Web

[www.lexisweb.com](http://www.lexisweb.com).

This search engine offers reviewed legal content. Much of the content is free, but law review articles and other items may require a fee.

## **Moot Court Simulations**

Instructions for Moot Court, Landmark Cases

[http://www.streetlaw.org/en/landmark/teaching\\_strategies/moot\\_court](http://www.streetlaw.org/en/landmark/teaching_strategies/moot_court)

*Putting on Mock Trials*, American Bar Association

<http://www.abanet.org/abastore/index.cfm?section=Main&fm=Product.AddToCart&pid=2350206>

Includes instructions for moot court exercises.

Verdict of History Michigan Supreme Court Historical Society

[http://www.micourthistory.org/lesson\\_plans\\_verdict.php](http://www.micourthistory.org/lesson_plans_verdict.php)

The Verdict of History project focuses on 20 landmark Michigan Supreme Court cases. Accompanying lesson plans include brief writing and mini moot courts.